83-1276



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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

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DAVID MONTGOMERY WEBB
Petitioner,

v.

ROBERT M. LANDON
~~TERRELL DON HUTTO~~
Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH JUDICIAL CIRCUIT

---

HARRY F. BOSEN, JR.
Harry F. Bosen, Jr., P.C.
306A East Main Street
Salem, Virginia 24153
(703) 389-6959

Attorney for Petitioner

## QUESTIONS PRESENTED

1. When, after the commencement of a bench trial, in the absence of surprise, the prosecution obtains a continuance in order to gather evidence to bolster its case, has the constitutional protection against double jeopardy been violated?

2. When, after the commencement of a bench trial, the prosecution obtains a continuance in order to gather evidence which was not obtained earlier because of a lack of due diligence, and the prosecution misrepresents the reasons for requesting the continuance, have the defendant's due process rights been violated?

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

Cases Continued: Page

Cases Continued: Page



Constitutional Provisions:



Statutes:

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported as David Montgomery Webb v. Terrell Don Hutto, No. 83-6086 (4th Cir. November 2, 1983), and is set out in the Appendix at A-1. The Fourth Circuit's denial of the petitioner's motion for rehearing was issued on December 9, 1983, and is in the Appendix at A-25. The decision of the District Court for the Western District of Virginia to grant the habeas corpus petition is reported at 564 F. Supp. 405 (W.D. Va. 1982), and appears in the Appendix at A-28. The order granting the writ of habeas corpus was issued December 8, 1982, and is at A-26. Amendments to the order were entered on December 10, 1982. A-56, A-58. The district court denied the respondent's motion to amend judgment or enter a new judgment on January 4, 1983. A-60. The

district court amended its order and opinion on February 2, 1983. A-62. The decision of the Virginia Supreme Court to deny Webb's appeal from his conviction was issued July 29, 1981, and is at A-64.

## JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered November 2, 1983. The petitioner's motion for rehearing was denied December 9, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests on the fifth and fourteenth amendments to the United States Constitution. The jurisdiction in the District Court for the Western District of Virginia was invoked pursuant to 28 U.S.C. §§ 2241, 2254. These provisions are set forth in the Appendix beginning at A-66.

## STATEMENT OF THE CASE

The petitioner, David Montgomery Webb, filed a petition for writ of habeas corpus challenging the validity of his conviction for possessing a controlled substance with intent to distribute, and for possession of a schedule II controlled substance. Sentence was suspended as to the possession count and sentence was partially suspended as to the distribution count, leaving a total sentence of six years incarceration.

Webb was arrested on October 30, 1979, when the City of Salem police executed a search warrant at the residence of Nancy W. Thompson. Webb opened the door to the police, and they proceeded past him to Ms. Thompson's bedroom in the back of the house and discovered Thompson and Virgil D. Spence handling what eventually proved to be cocaine and drug paraphernalia. The police seized the cocaine, a pair of scissors, a "coke set," a mirror, ledger books, and $6,500 in cash from the bedroom. Webb, Thompson, and Spence were indicted as co-defendants on May 16, 1980.

Webb's trial was scheduled for Thursday, July 17, 1980, in the Circuit Court for Salem. In preparing for trial, the Commonwealth's Attorney had made only limited efforts to obtain the testimony of either of Webb's co-defendants. A-32. Although the Commonwealth's Attorney was aware of the

identity of the counsel for Spence as early as November of 1979, and knew the identity of Thompson's counsel no later than February 1, 1980, both attorneys have indicated that the Commonwealth's Attorney never initiated any contact with them regarding the possibility of having their clients testify at the trial. See A-32. It was only shortly before the trial was to begin, on July 16, 1980, that the Commonwealth's Attorney telephoned the office of Spence's attorney, and he was told at that time that the attorney was out of town on vacation. A-35, 87-88.

On July 17, 1980, both the Commonwealth and the defense announced that they were ready to proceed. Webb was then arraigned. He pleaded not guilty, agreed to be tried on both counts of the indictment at the same time, and waived his right to a jury trial. This waiver was advised after Webb's attorney had checked the court file for subpoenaed

witnesses and determined that the co-defendants were not scheduled to testify against Webb. A-83-84. Furthermore, this conclusion had been verified by direct contact with Spence and Thompson. A-84-85.

The Commonwealth's first witness was the officer who had searched the premises. Cross-examination of this witness, however, raised considerable doubt whether Webb was involved with the discovered drugs and paraphernalia. The Commonwealth's Attorney thereupon requested a continuance so that he could obtain the testimony of Webb's co-defendants. Incredibly, he represented to the court that he had been in contact with the defense attorneys regarding the availability of their clients as prosecution witnesses. A-33-36.

The trial court, understanding from the Commonwealth's representations that "this witness would testify and the only reason for

the delay was to verify that to see that Mr. Phillips doesn't have some other plans for his client," granted the continuance. A-36. Webb's attorney objected to this continuance, but the trial was continued for five days until Tuesday, July 22, 1983. At that time, both co-defendants testified for the Commonwealth over the renewed objection of Webb's attorney. At the conclusion of the trial, Webb was convicted of possessing with intent to distribute a controlled substance and of possessing a schedule II controlled substance, receiving a six-year sentence. Spence was ultimately sentenced to four-years probation for possession of a controlled substance. Thompson received a six-year term of incarceration after being convicted of both possession and possession with intent to distribute.

Webb petitioned the Virginia Supreme Court to review the conviction. The Court,

however, found no "reversible error" and denied Webb's petition. A-64.

Webb subsequently sought and received a writ of habeas corpus from the United States District Court for the Western District of Virginia. Webb v. Hutto, 564 F. Supp. 405 (W.D. Va. 1982). Although Webb contended that the continuance violated his rights to due process, constituted double jeopardy, and denied him his right to speedy trial, the district court granted the writ solely on the double jeopardy issue and did not reach the merits of the two other points. 564 F. Supp. at 408.

The Fourth Circuit Court of Appeals reversed the district court, holding that the granting of a continuance could not serve as the basis for a finding of double jeopardy. Moreover, the court also ruled that notions of speedy trial and due process were not offended by the granting of the continuance.

The Court of Appeals subsequently denied Webb's petition for rehearing.

## REASONS FOR GRANTING CERTIORARI

The federal courts below decided important questions involving constitutional principles of double jeopardy and due process. Moreover, the decision of the Fourth Circuit Court of Appeals is in direct conflict with Downum v. United States, 372 U.S. 734 (1963). To the extent that the decision does not directly conflict with Downum, it presents a constitutional issue never specifically decided by any federal court and one upon which state courts have reached opposite conclusions. Compare State v. O'Keefe, 135 N.J. Super. 430, 343 A.2d 509 (1975), with In re Hunt, 46 N.C. App. 732, 266 S.E.2d 385 (1980). Finally, the decision of the court of appeals conflicts with precedent from that court. See United States v. Curry, 512 F.2d

1299 (4th Cir.), cert. denied, 423 U.S. 832 (1975).

I. THE PETITIONER'S CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY WAS VIOLATED BECAUSE THE PROSECUTION, IN THE ABSENCE OF SURPRISE, OBTAINED A CONTINUANCE AFTER THE COMMENCEMENT OF THE BENCH TRIAL TO GATHER EVIDENCE TO BOLSTER ITS CASE.

The Fourth Circuit Court of Appeals stated in its decision below:

> The simple, yet to us controlling, consideration is that the accused must be placed in jeopardy twice for double jeopardy to exist. It happens when the second event involves a completely new beginning, i.e., when the second proceeding takes place before a new trier of fact, whether that be a different judge or jury, or the same judge starting with a clean slate.

A-10-11. More detailed scrutiny of the doctrine of double jeopardy, however, reveals that this principle is not so simplisticly defined. Rather, the underlying objective of the double jeopardy clause is to prevent the prosecution from obtaining "another oppor-

tunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11 (1978).

In the landmark decision of Downum v. United States, 372 U.S. 1033 (1963), the prosecution and the defense both announced that they were ready to proceed. After the jury was selected, the prosecutor notified the judge that his key witness had not appeared. This witness had not been issued a summons nor had any other arrangement been made to guarantee his appearance. Rather, the prosecution relied upon the witness's wife to assist in securing the witness's attendance. The judge told the defense attorney that the case would have to be postponed and discharged the jury. Two days later, the missing witness was located. A second jury was impaneled and the defendant was convicted.

The Supreme Court ultimately reversed the

conviction, holding that the defendant's constitutional guarantee against double jeopardy had been violated. Although the Court refused to hold that absence of witnesses could never justify discontinuance of a trial, it stated:

> "The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses."

Id. at 737-38 (quoting with approval

Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931)) (emphasis added).

The dissent in Downum objected to the majority opinion because it appeared that the prosecutor had committed an "excusable oversight" which was inherent in the judicial system. 372 U.S. at 742. The dissent noted:

> There is no indication that the prosecutor's explanation was a mere cover for negligent preparation or that his action was in any way deliberate. There is nothing in the record that even suggests that the circumstances were used by the prosecutor for the purpose of securing a more favorable jury or in any way to take advantage of or to harass the petitioner. . . .
>
> . . . .
>
> . . . In this light I cannot see how this Court finds that the trial judge abused his discretion in affording the Government a two-day period in which to bring forward its key witness who, to its surprise, was found to be temporarily absent.

Id. at 742-43 (emphasis added).

Downum is controlling in the instant case. As in Downum, the prosecution here began the

trial without first determining that it had sufficient evidence to convict. Indeed, the fact pattern in this case is more egregious than that in Downum because the Virginia Commonwealth's Attorney apparently had not planned on securing the testimony of either of the co-defendants prior to trial. Arguably, the prosecutor in Downum at least made some effort to bring his witness to trial before it began. Moreover, the instant fact pattern would likely not even have satisfied the dissent in Downum. The Commonwealth's Attorney was not "surprised" by the absence of a key witness; nor is it apparent that the testimony of the witness who testified at the first proceeding "surprised" the Commonwealth. Rather, it is plain that the Commonwealth's Attorney suddenly, as noted by the Fourth Circuit, "woke up" mid-trial "to a perilously large gap in his case." A-4.

The Fourth Circuit distinguished Downum on the rather questionable grounds that Downum involved a "complete discontinuance after jeopardy first attached, so that an entirely new proceeding, hence a second, or double, jeopardy, inevitably arose when trial began anew." A-21. In essence, however, the only distinction between Downum and the instant case is that Downum involved a jury trial whereas the instant prosecution involved a bench trial. This is plainly a distinction lacking a difference. In both cases, jeopardy had attached in the first proceeding. See United States v. Jorn, 400 U.S. 470, 479 (1971) ("a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge") (emphasis added). In both instances, the prosecuting attorney "entered upon the trial of the case without sufficient evidence

to convict" and thus "took a chance" that he could prevail despite the deficiency of proof. Downum v. United States, 372 U.S. at 737.

This last point clearly represents the heart of the Downum decision. The case di not rest so much upon the identity of the trier of fact as it turned upon the conduct of the prosecutor. The Court rejected the notion that such thin distinctions were appropriate in its analysis: "There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses." Id. at 737-38. Indeed, both the majority and dissenting opinions focused upon the justification offered by the prosecution for permitting the trial to begin despite the fact that one of its key witnesses was absent.

It is clearly settled that constitutional rights are guaranteed despite an accused's decision to waive the right to a jury trial. Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 (1933). In Rosser, the prosecution asserted that a claim of prior jeopardy could only be maintained where a jury had been impaneled and sworn. The Virginia Supreme Court explicitly rejected the notion that an accused's decision to waive a jury trial in any way lessened his or her constitutional protections:

> It is settled law, everywhere, that jeopardy means the danger of conviction. In so far as the accused is concerned, this danger exists and is just as real when he is being tried by the court without a jury as it is when he is being tried by a jury. We perceive no difference. . . .
>
> The Constitution empowering the court to try a criminal case without the intervention of a jury does not deprive the accused of any protection he would have had if tried by jury. He simply waives the jury trial; nothing else.
>
> It was certainly not intended that in a trial before a court without a

> jury, the commonwealth, after introducing its evidence and finding it had failed to make a case against the accused, would be permitted to nolle prosequi the indictment and be entitled to subject the accused to another trial for the same offense. If this could be done, the accused would be liable to conviction for the same offense, in successive trials, subject only to the whim of the attorney for the commonwealth. This would violate the letter and spirit of the Constitution.

167 S.E. at 259.

A rule recognizing the jury trial/bench trial "distinction" would permit a prosecutor in bench trials to misrepresent the facts, disguise his lack of preparation, disguise his utter lack of diligence, begin his case, and, when it is found lacking, obtain a continuance to shop for more evidence as needed. This same leisure would be denied the prosecutor who presents his case before a jury. Moreover, the prosecutor in a bench trial would be permitted to avoid a nolle prosequi by misstating the facts so that his inexcusable delay could be justified under

the rubric "continuance."

The emphasis on the conduct of the prosecution was also recognized in Illinois v. Somerville, 410 U.S. 458 (1973). In Somerville, the Court distinguished Downum and the rule therein by noting that the prosecutor's conduct in Downum operated to grant him time to strengthen his case:

> This situation is thus unlike Downum, where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case. Here, the delay was minimal, and the mistrial was, under Illinois law, the only way in which a defect in the indictment could be corrected.

Id. at 1073 (emphasis added).

In addition to Somerville and Downum, it appears uniformly recognized that retrial is barred if the only reason for discontinuance is to afford the prosecution an opportunity to strengthen its case. For example, in United States v. Jorn, supra, the trial court had sua sponte declared a mistrial when it

discovered that the government had not properly informed its witnesses of their fifth amendment rights against self-incrimination. This Court held that the mistrial barred retrial and noted:

> The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee.

400 U.S. at 486 (emphasis added).

Similarly, in McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), the state had not properly prepared its case by insuring that its witness would testify favorably. When the witness asserted his privilege against self-incrimination, the judge granted a nolle prosequi of the indictment. The Fifth Circuit Court of Appeals held that subsequent prosecution was barred and noted:

> The prosecutor's uncomfortable position was caused by nothing more unusual than his reliance on a vacillating witness and on one whose testimony he had not sufficiently

> insured would be forthcoming. . . . We hold that the granting of the nolle prosequi in order to allow the State an opportunity to shore up that weakness violated McNeal's Fifth and Fourteenth Amendment rights.

Id. at 1152 (emphasis added).

In State v. O'Keefe, 135 N.J. Super. 430, 343 A.2d 509 (Law Div. 1975), the court engaged in an application of the principles announced in Downum that is highly instructive in the instant case. In O'Keefe, the prosecutor had presented his evidence when the judge observed that the state had failed to submit any evidence of a fact essential to conviction. The judge thereupon granted the state a continuance of two weeks to enable the state to gather the necessary evidence. On appeal, the court held that this continuance constituted a violation of the constitutional prohibition against double jeopardy. Significant in the court's ruling was the fact that the prosecutor's conduct constituted "inexcusable neglect." The court

noted the following standard for making this determination:

> As to whether the neglect is excusable, the judge might consider whether the State was represented by counsel or whether a police officer presented the evidence, as in State v. Menke, supra; whether the prosecutor in good faith misinterpreted what may fairly be considered unsettled or ambiguous legal precedent, as in State v. Farmer, supra and whether the State failed to offer readily available evidence inadvertently overlooked or innocently not produced in the bustle of trial and trial preparation as opposed to evidence whose existence had not even been investigated.

343 A.2d at 515 (emphasis added). This observation is significant in the instant case because the Virginia Commonwealth's Attorney totally disregarded the prospect that Thompson and/or Spence might testify for the prosecution. Rather, as in O'Keefe, the prosecution clearly decided to obtain this evidence only after it had already started to present its case.

The Fourth Circuit sought to distinguish

O'Keefe on the grounds that the delay there was two weeks, whereas the instant delay in this case was only for five days. It is not clear, however, that the length of time is significant when gauging a double jeopardy infringement. Indeed, in Downum, the delay was "merely" two days. Nevertheless, despite this relatively "brief" delay the Court found that a double jeopardy violation had occurred.

II. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE GRANTING OF THE CONTINUANCE, FOLLOWING MISREPRESENTATION BY THE PROSECUTION, TO ALLOW THE PROSECUTION TO GATHER EVIDENCE THAT WAS NOT OBTAINED EARLIER BECAUSE OF A LACK OF DUE DILIGENCE.

It is clear that egregious prosecutorial misconduct suffices to establish a due process violation when the prosecutor by his actions seeks to subvert the protections afforded by the double jeopardy clause. Oregon v. Kennedy, ___ U.S. ___, 102 S. Ct.

2083 (1982); Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958); United States v. Wilkins, 348 F.2d 844 (2d Cir. 1965); Price v. Slayton, 347 F. Supp. 1269 (W.D. Va. 1972); see also United States v. Jorn, supra; Brock v. North Carolina, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring).

In Brock, Justice Frankfurter noted in his concurring opinion with regard to such due process violations:

> A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.

Id. (emphasis added). This language is instructive in determining the bounds of propriety within which the state must work because society's interest is not

simply to convict those who are guilty. Rather, its interest is in promoting "fair trials designed to end in just judgments." Wade v. Hunter, 336 U.S. 684, 689 (1949).

Moreover, it is established that, although the decision to grant or deny a motion for continuance is traditionally within the discretion of the trial judge, such discretion may be exercised in a manner so fundamentally unfair as to violate the accused's rights under the fourteenth amendment. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975); see also Ungar v. Sarafite, 376 U.S. 574 (1964); United States v. Curry, supra (motion for continuance properly denied where due to dilatory tactics); United States v. Inman, 483 F.2d 738 (4th Cir. 1973) (denial upheld when due solely to dilatory tactics).

The party requesting the continuance for the purpose of securing an absent witness must have exercised due diligence, demonstrated the necessity and materiality of the witness, and must not be acting to delay or evade, and the motion must be made in good faith and without contrivance. Grady v. Alabama, 569 F.2d 1313 (5th Cir. 1978). If "due diligence" is lacking, the continuance will be denied. See Shifflet v. Commonwealth, 218 Va. 25, 235 S.E.2d 316 (1977); Anthony v. Commonwealth, 179 Va. 303, 18 S.E.2d 897 (1942).

Not only did the negligence of the prosecutor in this case amount to a lack of "due diligence," but it also constituted an active subversion of Webb's double jeopardy and due process protections. At trial, the Commonwealth's Attorney misrepresented to the court

that he had contacted both attorneys representing Spence and Thompson regarding whether they would testify on behalf of the Commonwealth. In fact, the Commonwealth's Attorney later admitted under oath in district court that he had never contacted Thompson's attorney regarding potential testimony for the prosecution. A-89. Moreover, it was Spence's attorney who had contacted the Commonwealth's Attorney only once regarding a possible plea bargain. A-81-82. The Commonwealth's Attorney flatly rejected this offer. Spence's attorney further characterized any discussion between himself and the Commonwealth's Attorney regarding potential testimony as "casual." A-83.

The Commonwealth's Attorney's distortion of the facts is further manifested by his failure to subpoena either of the

co-defendants. Indeed, prior to trial, he was not at all certain that Spence was an available witness. At the district court hearing he stated that he had "felt that there was a strong possibility that Spence would testify." A-91 (emphasis added).

Significantly, at Webb's trial, the Commonwealth's Attorney did not mention that Spence was in the courthouse when he requested a continuance. When the district judge later asked the prosecutor why he did not then call Spence to the stand, the Commonwealth's Attorney lamely professed a desire to allow the potential witness an opportunity to first consult with his attorney. A-91. This purported benevolence is remarkable given that it suddenly arose in the brief interlude between the moment when the Commonwealth's Attorney announced

that he was ready for trial and the conclusion of the testimony of his first witness. Indeed, the Fourth Circuit recognized the absurdity of the explanations given by the Commonwealth's Attorney:

> In the light of the findings of the district judge, we place no credence in the Commonwealth's proferred explanation that it was tender concern for Spence's right to the advice of counsel that made the prosecution unwilling to call Spence to the stand on July 17th. There was not even an attempt to call Spence for the limited initial purpose of learning whether he had had the benefit of counsel's advice as to whether to testify. His presence in the courthouse during the trial indicates that he was ready to testify. From the prosecutor's remarks it is clear that he had counsel representing him, and it required no great leap to arrive, at least preliminarily, at the conclusion that the advice of counsel was that he should testify.

A-18.

The trial court relied upon the prosecutor's misrepresentations when it

granted the continuance. It is submitted that the prosecutor's misconduct thus represented a patent subversion of Webb's protections against double jeopardy and constituted a violation of the Due Process Clause. Moreover, the reliance upon the misstatements resulted in a ruling that was so fundamentally unfair as to violate the Constitution.

The Fourth Circuit asserted that Webb's release should be overturned because "Webb has failed to identify any prejudice which he has suffered." A-14. Aside from the fact that the due process issue was not argued or briefed before the Court of Appeals, examination of the circumstances reveals prejudicial error accruing to Webb. First, the record clearly reveals that Webb would have requested a jury trial had he known his co-defendant would testify against him.

A-83-84. Once the continuance was granted and Webb was forced to return in five days and defend himself anew, he had no opportunity to place the credibility of Spence or Thompson before a jury. There is no provision under Virginia law for allowing the defendant to bring a jury in at that point of the trial. Furthermore, had Webb moved for a mistrial at that point, he would have provided the prosecutor precisely what he was seeking--an opportunity to make a case which he did not have.

## CONCLUSION

The discontinuance of the trial in order to allow the prosecutor--who misrepresented his intentions to the court--to gather further evidence against the petitioner constituted a violation of the Double Jeopardy and Due Process Clauses as guaranteed by the fifth and fourteenth amendments to the United States Constitution.

THEREFORE, the petitioner submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument. The petitioner

requests that a Writ of Certiorari be granted.

Respectfully submitted,

Harry F. Bosen, Jr.
Harry F. Bosen, Jr., P.C.
306A East Main Street
Salem, Virginia 24513

Attorney for Petitioner

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APPENDIX

HARRY F. BOSEN, JR.
Harry F. Bosen, Jr., P.C.
306A East Main Street
Salem, Virginia 24153

Attorney for Petitioner

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 83-6086

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David Montgomery Webb,

Appellee,

v.

Terrell Don Hutto,

Appellant.

---

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge. C/A 81-0369

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Argued June 7, 1983 Decided November 2, 1983

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Before WIDENER and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

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Richard B. Smith, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia on brief) for Appellant, Harry F. Bosen, Jr. (Harry F. Bosen, Jr., P.C. on brief) for Appellee.

MURNAGHAN, Circuit Judge:

David Montgomery Webb was convicted in the Circuit Court for the City of Salem, Virginia on July 24, 1980 for possession of, and for possessing with intent to distribute, a controlled substance. Sentence was suspended as to the possession count and twelve years were imposed on the possession with intent to distribute count, but six years were suspended, leaving a sentence of six years to be served.

We consider an appeal by the Commonwealth from a grant to Webb of the writ of habeas corpus by the United States District Court for the Western District of Virginia. The grant was limited to the conviction for possession with intent to distribute, Webb having withdrawn that portion of his petition for habeas corpus regarding his conviction on the charge of simple possession.

The police had been properly prudent

and had obtained a warrant to search a house for suspected marijuana possessed with intent to distribute. They executed the warrant on October 30, 1979, and, upon their entry of the house, they caught Nancy W. Thompson, the owner, and Virgil D. Spence with quantities of a powder which later proved to be methamphetamine. Spence was cutting powder over scales. Thompson stood by with scissors.

Webb had responded to the knock of the police at the door. He was shown to have resided at the house whenever he visited the Roanoke area. The crucial question was whether Webb was a participant or merely an innocent bystander in what the evidence established to be a developed drug operation.

All three, Webb, Spence and Thompson, were indicted. Webb was the first to come to trial. Proceedings commenced on Thursday, July 17, 1980, in the Circuit Court for the City of Salem, Virginia. Both the prosecu-

tion and the defense announced their readiness for trial. Webb waived trial by jury, the witnesses who counsel indicated would give evidence were sworn and separated, and the Commonwealth's first witness, a police detective, testified. He was effectively cross-examined in a manner raising substantial doubt as to the existence of a connection between Webb and the drugs. The testimony was that, on answering the knock of the police officials executing the warrant, Webb took no steps to warn Spence and Thompson. Nor were the drugs found with clothing possessed by Webb, but rather were in locations which were reasonably to be associated with Thompson.

Thereupon the prosecuting attorney woke up to a perilously large gap in his case. He moved for a continuance, to obtain testimony from Spence and Thompson in order to bolster the case against Webb. The prose-

cutor explained:

> In the preparation of this case, the Commonwealth has not attempted, although there are two other co-defendants, has not attempted to enter into any sort of plea agreement wherein a co-defendant whether that co-defendant be Mr. Webb or Miss Thompson or Mr. Spence would testify against any of the other two co-defendants. We have approached counsel . . . co-counsel about whether or not they felt it would be in their client's best interest to testify voluntarily for the Commonwealth. And in preparing for trial yesterday I touched base once again the office of Mr. Spence's attorney, that being Mr. Charles Phillips. Mr. Phillips being out of town, Mr. Doherty received the message and being unaware of this particular case attempted to contact Mr. Spence as to whether or not he perhaps might wish to testify in this case. . . . We're asking a continuance, so to speak, or a recess until Mr. Phillips who is Mr. Spence's attorney, who is presently on vacation would return to town on Monday, so that he might properly advise his client whether or not it would be in his best interest to voluntarily testify. . . . I would only assume that Mr. Spence would, if he desired to testify as to the truth, from what the Commonwealth knows of the case the truth would be [sic] have

> tremendous impact on this particular case. And we respectfully ask the Court to grant the Court . . . grant the Commonwealth that recess so that we might determine whether or not Mr. Spence does in fact wish to testify as to the truth of the facts before the Court today.

The federal district judge who presided in the habeas corpus proceeding, whose findings we, of course, respect, determined "that the Commonwealth Attorney requested the continuance solely because of his realization that the case could not be made against the petitioner without the testimony of at least one of the co-defendants." He went on to point out:

> Neither of the co-defendants [Spence and Thompson] had been subpoenaed to testify at the trial held that day [July 17, 1980], that one of the co-defendants, Virgil Spence, was present in the courthouse during the trial of petitioner, with the knowledge of the Commonwealth's Attorney, and that despite his presence, the co-defendant was not called to the stand to determine whether he would answer questions or not. Counsel repre-

> senting Spence at the time of the trial indicated in the habeas proceeding that he instructed his client to "tell the truth and cooperate to the best of his ability" should he be subpoenaed.[1]*

The Salem Circuit Court concluded that, in the interest of justice, it being unclear whether Spence's counsel would or would not advise him to testify, it would be best to continue the trial for five days, until the 22nd of July, 1980. On that date Spence and Thompson testified. The evidence of Thompson was especially damaging to Webb.[2] The determination of guilt which followed was well supported by the record.

About the kindest word that one can apply to the prosecutor's failure to subpoena Spence and Thompson, and his failure to establish in advance of trial and they would not be advised to decline to testify on self-incrimination grounds is "sloppy."[3]

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* Footnotes follow the text of the opinion.

The petition for habeas corpus was grounded on three asserted constitutional infirmities:

A. Violation of Webb's rights to due process.[4]

B. Double jeopardy in violation of the Fifth Amendment.[5]

C. Denial of Webb's right to a speedy trial.

The assertion that speedy trial was denied need not detain us long. It was not argued on appeal. The right to a speedy trial was certainly satisfied here once a trial had commenced within nine months of the alleged offense and the first witness had been examined and cross-examined. Furthermore, a delay of five days (two of them Saturday and Sunday, when the court customarily would not be sitting in any event) was well within the customary time limits for a continuance, and simply does not support an

assertion that the accused was not speedily brought to trial, especially considering the total lack of prejudice to the defendant here. Cf. Barker v. Wingo, 407 U.S. 514, 530 (1972) (five years' delay not unconstitutional); Ricon v. Garrison, 517 F.2d 628 (4th Cir. 1975), cert. denied, 423 U.S. 895 (1975) (36 month delay not unconstitutional).

As for double jeopardy, the district judge was greatly influenced by what apparently seemed to him no more than an insignificant formal difference between (a) a mistrial, involving a discharge of the jury and an attempt to begin anew before another jury, (b) a dismissal in a non-jury proceeding followed by a complete recommencement before the same judge (both of which, in the absence of manifest necessity, would be impermissible on grounds of double jeopardy), and (c) a postponement for a few days in a non-jury trial followed by a continuation of

the same case, taking up before the same judge at the point where the case had previously left off. However, the district judge was frank to acknowledge that a search for authority to sustain the proposition that a continuance should be deemed to constitute double jeopardy upon resumption by the same judge where the case had left off had "proved fruitless."[6]

The difficulty is that the doctrine of double jeopardy is by no means devoid of thin distinctions. Immediately before, and immediately after, empaneling and swearing of the jury things are much the same, but in one jeopardy has not attached while, in the other, it has. Cf. Crist v. Bretz, 437 U.S. 28 (1978). So, too, immediately before and immediately after the swearing of the first witness in a non-jury trial the difference is, in many respects, miniscule. Cf. Serfass v. United States, 420 U.S. 377 (1975). The

simple, yet to us controlling, consideration is that the accused must be placed in jeopardy twice for double jeopardy to exist. It happens when the second event involves a completely new beginning, i.e., when the second proceeding takes place before a new trier of fact, whether that be a different judge or jury, or the same judge starting with a clean slate. It simply does not occur when the very same proceeding continues on after a brief postponement before the first and only trier of fact, as was the case here.

The point is graphically illustrated by the decision in Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), cert. denied, sub nom Mitchell v. Harris, 444 U.S. 1025 (1980). The jury trial there was, in circumstances not amounting to manifest necessity, aborted by the court's sua sponte declaration of a mistrial. A subsequent, wholly new, prosecution was held barred. However, Chief Judge

Haynsworth, speaking for the court, was careful to point out that a less extreme alternative, which would not have brought double jeopardy into play, existed: "The discovery rule allows for a continuance for disclosure and inspection if new matter surfaces upon trial. This was an obvious solution to the problem." 607 F.2d at 1086.

In Matter of Hunt, 46 N. Car. App. 732, 266 S.E.2d 385 (1980), it developOed, in two cases both considered in the same appeal, that the prosecution could not succeed unless a continuance were granted to round up additional testimony. In one case the judge sua sponte granted a continuance. In the other the prosecution requested and was granted the same relief. The duration of the postponements were 9 days and 42 days respectively. The North Carolina Court of Appeals, in a carefully reasoned opinion, rejected claims of double jeopardy stating:

> It is clear in each of the cases that jeopardy attached only once --at the time the judge began to hear evidence. While respondents conceivably may have been put through additional embarrassment, anxiety and expense as a result of the continued hearings, the subsequent hearing before the same trier of fact was not a second trial barred by the Double Jeopardy Clause.
>
> . . . In the cases before us the Fifth Amendment rights of each of the accused under the Clause--the right to have his case heard in its entirety and determined before the same trier of fact--has not been infringed.

46 N. Car. App. at 735-36; 266 S.E.2d at 387-88.

We would not be taken to imply that, simply by use of terminology, a prosecutor could change a result. If what occurred indeed amounted to a beginning over, rather than a progression from the point at which the case had been suspended, calling it a continuation when actually it was a complete retrial would not enable the prosecution to escape the stricture against double jeopardy.

However, in the instant case the record makes it indisputably clear that a true continuance was all that was involved.[7]

Nor, if there were egregious prosecutorial misconduct designed to make a delay appear to be a continuance when it would be more appropriate to speak in mistrial or jury discharge terms, do we wish to be understood as saying that the raising of the point only under double jeopardy should fail because the proper rubric was "denial of due process." While Webb, in his Brief, phrases his argument only in double jeopardy terms, we are loath to dispose of it on such a technical basis, given that he has made it altogether clear that the asserted misbehavior of the prosecutor is the gravamen of his complaint.

Turning, therefore, to that aspect of the matter, we point out first that Webb has failed to identify any prejudice which he has suffered.[8] We simply are not prepared to

assign to him vested rights in an ill-prepared prosecutor. Except for a claimed "right" not to have the case properly tried, with the ascertainment of truth enhanced, Webb points to nothing which has operated to injure his posture before the Circuit Court for the City of Salem.

It lay within the discretion of the state court judge who presided at the criminal trial to determine how severe the sanction should be for exceedingly poor preparation on the part of the Commonwealth's prosecutor. The prosecutor was fortunate that the trial judge did not order that the case proceed, without interruption, after a denial of the motion for a continuance, with a determination of "Not Guilty" the probable result.[9]

There is nothing in the record to show any predisposition of trial judges in the Virginia court system, or of the trial judge

in Webb's case in particular, regularly to come to the rescue of hapless prosecutors to the point where objectivity might become suspect. Rather, it appears that the court was scrupulously interested in insuring that justice be done. There is manifestly a public purpose served by that objective.

Webb, as might be expected, has focused attention on the fact that, while the continuance request centered on Spence and whether he would testify, Thompson's testimony is what did him in. However, both Spence and Thompson testified. Each was spotlighted as someone in a position where his or her testimony could be quite relevant. The prosecutor, belatedly waking up, could hardly overlook Thompson too as a possible source once he realized that her co-defendant, Spence, might prove helpful.

For all those reasons, we are not prepared to conclude that prosecutorial

overreaching, either in its own right, or as a sub-species of the genus double jeopardy, has been made out sufficiently to constitute grounds under the Fifth or the Fourteenth Amendments for voiding the conviction of Webb in the Commonwealth court.

Accordingly, the judgment below is reversed, and the case remanded with instruction to the district court to deny the writ.

REVERSED AND REMANDED.

WIDENER, Circuit Judge, concurs in the result.

FOOTNOTES

1 In the light of the findings of the district judge, we place no credence in the Commonwealth's proferred [sic] explanation that it was tender concern for Spence's right to the advice of counsel that made the prosecution unwilling to call Spence to the stand on July 17th. There was not even an attempt to call Spence for the limited initial purpose of learning whether he had had the benefit of counsel's advice as to whether to testify. His presence in the courthouse during the trial indicates that he was ready to testify. From the prosecutor's remarks it is clear that he had counsel representing him, and it required no great leap to arrive, at least preliminarily, at the conclusion that the advice of counsel was that he should testify.

2 E.g.:

Q. So Larry [Webb's brother] gave you this $10,000.00, then how were the drugs acquired? Who acquired the drugs?

A. Well, for a lengthy period of time, there was travel over the city trying to find a deal.

Q. Who would travel over the city?

A. Well, I made a few calls. David [David Montgomery Webb, the petitioner] made a few calls, you know, trying to get something worked out..a large quantity of something to

work out at this point..to my knowledge this was the first big deal.

Q. What do you mean big deal?

A. This powder right here that we're referring to in this picture.

Q. Again, that was what three or four weeks prior to the 30th?

A. Yes. It seems though for some reason that was a lot of difficulty. there was money there but yet there was no drugs available. That was what the consequences were at the time. Nobody could find any large quantity of drugs.

Q. Had you ever talked to David Webb about this dilemma? Money but no drugs.

A. He and I had both discussed it, yes. Openly, between us.

Q. What efforts did he tell you that he was making to dissolve the dilemma?

A. To my knowledge he was working on it most of the time because his brother was very insistent that, you know, let's get this thing going, let's get this ball rolling so forth and so on.

Q. Who consummated this big deal? This first big deal you spoke of?

A. To my knowledge, David took the money left my home brought the drugs back.

Q. When you say to your knowledge, were you present when he physically brought the drugs in the house?

A. Yes.

It merits mention that the Joint Appendix was woefully deficient, eliminating all but two insignificant pages of Thompson's testimony. Admittedly, under Federal Rule of Appellate Procedure 30, we may consider parts of the record not included in the Joint Appendix; the same rule also counsels against unnecessary inclusion in the Appendix of irrelevant portions of the record. But where, as here, the excluded testimony was quite significant, counsel would have better discharged their responsibilities by including Thompson's testimony in the Appendix.

3 It appears that the prosecutor was not interested in working out plea bargains with Spence and Thompson, presumably because he had them dead to rights. However, that consideration made it not unlikely that they would cooperate with the Commonwealth, even in the absence of any advantage plea bargains might insure, in the hopes that such cooperation would be taken into account in their favor at sentencing time.

4 The point has not been pursued on appeal, except in the sense that "prosecutorial overreaching" has been used by Webb to describe the behavior he contends should make the continuance here granted indistin-

guishable from a discontinuance by way of mistrial or nolle prosequi which, on double jeopardy grounds, would preclude further prosecution.

5 The Commonwealth has asserted and argued that the double jeopardy issue was not adequately preserved for review; the petitioner has argued the contrary at some length. We prefer, under all the circumstances of the case, to consider the merits of the double jeopardy claim, inasmuch as the conclusion we have reached leads to no different result than if we had declined to consider that issue.

6 The cases relied on by the district judge without exception involved complete discontinuance after jeopardy first attached, so that an entirely new proceeding, hence a second, or double, jeopardy, inevitably arose when trial began anew. Illinois v. Somerville, 410 U.S. 458 (1973) (Manifest necessity was held to permit a second trial even following discharge of the jury in the first proceeding after jeopardy had attached); Downum v. United States, 372 U.S. 734 (1963); Green v. United States, 355 U.S. 184 (1957); Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), cert. denied, sub nom Mitchell v. Harris, 444 U.S. 1025 (1980); Mizell v. Attorney General of New York, 586 F.2d 942 (2d Cir. 1978), cert. denied, 440 U.S. 967 (1979) (It was accepted that had there been a continuance, instead of a jury discharge, there would have been no double jeopardy); Hunter v. Wade, 169 F.2d 973 (10th

Cir. 1948), affirmed, 336 U.S. 684 (1949) (The second case was allowed to proceed because termination of the first was a matter of manifest necessity.); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931); United States v. Levy, 232 F. Supp. 661 (N.D. Fla. 1964) (Another "imperious" and "urgent" necessity case where retrial was permitted).

The only case mentioned by the district judge involving a continuance, as distinguished from a discharge of the jury and a subsequent new trial, found that double jeopardy did not result. United States v. Gunter, 631 F.2d 583 (8th Cir. 1980).

The same observations may be made as to additional citations made by counsel for Webb. They involved complete discontinuance of the first proceeding. Arizona v. Washington, 434 U.S. 497 (1978) (Manifest necessity was determined to justify retrial despite discontinuance of the first proceeding after jeopardy had attached); United States v. Jorn, 400 U.S. 470 (1971).

Counsel's citation of a case involving only a continuance likewise held that no double jeopardy was present. United States v. Luschen, 614 F.2d 1164 (8th Cir. 1980), cert. denied sub nom King v. United States, 446 U.S. 939 (1980) (The case appears to present only a permission by the court to reopen an issue during rebuttal, rather than a continuance. However, counsel for Webb in his brief has asserted: "Luschen involved a

continuance, and there the continuance granted was only overnight, to permit the prosecution to run additional drug analyses suggested by the defendant.").

7 Subsequent to oral argument, counsel for Webb called to the court's attention the decision in State v. O'Keefe, 135 N.J. Super. 430, 343 A.2d 509 (Law Div. 1975). There a two-week continuance granted sua sponte just as the prosecution was about to rest its case in a court which sat every weekday was held to bar, on double jeopardy grounds, any further proceedings in the case. If forced to choose between O'Keefe and the holding in the later decision in Matter of Hunt, 46 N.Car. App. 732, 266 S.E.2d 385 (1980), we would be inclined to regard Hunt as more applicable to the case before us. However, O'Keefe is also distinguishable in a significant respect. The delay was much less in Webb's case, essentially 3 days, given that Saturday and Sunday were not ones on which the court would customarily sit. The holding in O'Keefe was:

> A two-week continuance was an unreasonable break in the continuity of a trial being conducted in a municipal court that sits every weekday.

135 N.J. Super. at 441, 343 A.2d at 515.

O'Keefe further realized:

> Even though a declaration of mistrial caused by prosecu-

> torial neglect would bar retrial, a continuance in the course of a trial caused by prosecutorial neglect should not bar resumption unless the neglect is inexcusable and the continuance is an unreasonable break in the continuity of the trial.

135 N.J. Super. at 440, 343 A.2d at 515. We cannot say that what happened here was both inexcusable in its neglect and unreasonable in the duration of the break.

8 In that case, the relief sought is not available. United States v. Curry, 512 F.2d 1299, 1306 (4th Cir. 1975), cert. denied, 423 U.S. 832 (1975) ("The law does not require that a trial be free of error; it only requires that the trial be fair and free of prejudice to the defendant."); cf. Watkins v. Foster, 570 F.2d 501, 506 n.6 (4th Cir. 1978) (Where improper cross-examination by prosecutor shown, question becomes whether it "was so prejudicial as to deprive [defendant] of a fair trial.").

9 The Commonwealth insists that it had sufficient other witnesses so that, if the requested continuance had been denied, it could still have gone forward and presented enough evidence to sustain a conviction. The district judge appears not to have been impressed by that consideration, nor are we.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-6086

David Montgomery Webb, Appellee,

versus

Terrell Don Hutto, Appellant.

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O R D E R

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Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener and Judge Haynsworth.

For the Court,

/s/ William K. Slate, II
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

| | | |
|---|---|---|
| DAVID MONTGOMERY WEBB<br>Petitioner | ) | Civil Action No. 81-369-R |
| v. | ) | O R D E R |
| TERRELL DON HUTTO<br>Respondent | ) | By: Hon. James C. Turk<br>Chief U.S. District Judge |

In accordance with the Memorandum Opinion entered this day, it is hereby

ADJUDGED AND ORDERED

as follows:

(1) that the writ of habeas corpus sought by petitioner in this proceeding is hereby granted;

(2) that petitioner, David Montgomery Webb, be released from the custody of the respondent for that conviction imposed by the Circuit Court for the City of Roanoke, Virginia, on July 24, 1980, namely

(a) Criminal Case No. 1614 - twelve years for possession with intent to distribute a controlled substance

unless the Commonwealth of Virginia elects to re-arraign and re-try him within ninety (90) days from the date of this Order;

(3) that this Order shall in no way affect any other sentence of imprisonment which Petitioner Webb may now be serving or to which he is subject to serve in the future.

ENTER: This 7th day of December, 1982.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

| | | |
|---|---|---|
| DAVID MONTGOMERY WEBB<br>Petitioner | ) | Civil Action No. 81-0369-R |
| v. | ) | MEMORANDUM OPINION |
| TERRELL DON HUTTO,<br>Respondent | ) | By: Hon. James C. Turk<br>Chief U.S. District Judge |

David Montgomery Webb filed this petition for a writ of habeas corpus challenging the validity of the judgment of the Circuit Court for the City of Roanoke entered July 24, 1980, in which he was found guilty of Possession with Intent to Distribute a Controlled Substance and Possession of a Schedule II Controlled Substance. The court sentenced petitioner under those convictions, suspending one sentence and partially suspending the second sentence so that petitioner must serve a total of six years.

Petitioner now challenges the constitutionality of his confinement. Specifically, petitioner contends that the trial

court granted the prosecution a continuance during the presentation of the state's evidence solely for the purpose of seeking out additional evidence against the accused. Petitioner asserts that the granting of the continuance violated petitioner's right to due process of law under the Fourteenth Amendment, right to a speedy trial under the Sixth Amendment, and right against double jeopardy.

The Commonwealth responded to the petition for a writ of habeas corpus with a Motion to Dismiss. Briefs were submitted from both the petitioner and the respondents with regard to the Motion. By Order and Memorandum Opinion entered May 20, 1982, this Court granted the respondent's Motion to Dismiss. However, upon motion of petitioner to reconsider, the Order of May 20, 1982, was vacated. The matter was set for an evidentiary hearing so that the record could be

further developed. That hearing having been held, the petition for a writ of habeas corpus is again before the Court.

II. STATEMENT OF FACTS

During the night of October 30, 1979, the City of Salem police obtained a warrant and searched the residence located at 716 North Mill Road, Salem, for marijuana as the police had probable cause to believe that the occupants had possession of marijuana with intent to distribute. When the police knocked on the door, petitioner answered almost immediately.[1*] The police showed petitioner the warrant, entered the premises, and proceeded directly to a bedroom in the back of the house where they found two individuals, Nancy W. Thompson and Virgil D.

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*Footnotes follow the text of the opinion.

Spence. Spence appeared to be cutting powder over scales; Thompson stood nearby with scissors. Trial Transcript, at 10. The police advised them they were under arrest and escorted them to the living room where petitioner had been waiting.

The police subsequently continued their search of the premises. Among those items found were scales, plastic baggies containing a powder substance[2], a cocaine set and mirror, marijuana, a ledger book, in excess of $6,560 in cash, a bill from International Harvester in the name of petitioner with the address being searched imprinted upon it, and assorted other drug paraphernalia. Based upon the search and seizure of the items, petitioner was indicted by the Grand Jury on May 16, 1980. Thompson and Spence were similarly indicted as co-defendants.[3]

The first trial scheduled among the

three proceeded against petitioner and was set for July 17, 1980. Prior to trial, the Commonwealth's Attorney, by his own admission at trial, made only limited efforts to obtain the testimony of the codefendants against petitioner. Trial Transcript, at 45. This is further reflected in testimony by counsel for Spence who did not recall the Commonwealth's Attorney being the "aggressor" as far as communications between the two were concerned. Hearing, at 11. Rather, counsel for Spence believed that he had contacted the Commonwealth's Attorney on one occasion regarding a plea bargain for his client but that the Commonwealth's Attorney did not seem interested. Hearing, at 11. Accordingly, any contact between the Commonwealth and the defendants was minimal at best.

Petitioner's trial commenced July 17, 1980. The Clerk asked the Commonwealth and the defendant whether they were ready to

proceed. Both answered in the affirmative. Trial Transcript, at 2. The Court arraigned the defendant at that time during which he plead not guilty to both counts. The defendant further agreed that both indictments would be tried at the same time. The defendant then waived his right to a jury trial and the Commonwealth put on its evidence.

The Commonwealth first called the detective who had searched the premises on October 30, 1979, and found the drugs. Testimony elicited from the detective on direct examination recited the circumstances surrounding the search and seizure. The cross examination of the witness by counsel for the accused effectively implied that the accused was not involved with the drugs found in the house. On cross examination, the witness testified that the accused did not try to run and in fact invited the police into the house, Trial Transcript, at 27, that the

accused answered the door immediately although it was apparent that individuals in the back room where the drugs were found probably would not have heard the knock on the door, id., at 30, that no drugs were found on the dresser with the accused's clothes, id., at 33, that many of the items seized were situated near female apparel or cosmetics, id., at 35, that the ledger book and the cash found were located next to a bank account identification card belonging to Thompson, id., at 36, and that the search warrant and accompanying affidavit executed by the police identified Thompson only as the seller of drugs, id., at 40.

Immediately upon the completion of the testimony of this witness, the Commonwealth's Attorney moved for a continuance so that he could obtain the testimony of the co-defendants against the accused:

> ...In the preparation of this case, the Commonwealth has not

attempted, although there are two other co-defendants, has not attempted to enter into any sort of plea agreement wherein a co-defendant whether that co-defendant be Mr. Webb or Miss Thompson or Mr. Spence would testify against any of the other two co-defendants. We have approached counsel...co-counsel about whether or not they felt it would be in their client's best interest to testify voluntarily for the Commonwealth. And in preparing for trial yesterday I touched base once again the office of Mr. Spence's attorney, that being Mr. Charles Phillips. Mr. Phillips being out of town, Mr. Doherty received the message and being unaware of this particular case attempted to contact Mr. Spence as to whether or not he perhaps might wish to testify in this case...We're asking a continuance, so to speak, or a recess until Mr. Phillips who is Mr. Spence's attorney, who is presently on vacation would return to town on Monday, so that he might properly advise his client whether or not it would be in his best interest to voluntarily testify...I would only assume that Mr. Spence would, if he desired to testify as to the truth, from what the Commonwealth knows of the case the truth would be have tremendous impact on this particular case. And we respectfully ask the Court to grant the Court...grant the Commonwealth

> that recess so that we might determine whether or not Mr. Spence does in fact wish to testify as to the truth of the facts before the Court today.

Trial Transcript, 45-46.[4]

Based solely upon the representations of the Commonwealth's Attorney, the Court understood from the statement that the witness would testify in the proceeding and the "only reason for the delay was to verify that to see that Mr. Phillips doesn't have some other plans for his client other than to..." Trial Transcript, at 46. So that the record would be clear, the court requested that the absent attorney's partner relate to the court what plans the attorney had for the co-defendant. Over the vehement objections of the accused's counsel, the Court granted the motion for the continuance:

> BY THE COURT: Well, in the interest of justice as you indicated I don't know whether this person would be more favorable to the Commonwealth or more favorable to the defendant, but

> he can shed some light on the truth of it. Under the circumstances, the Court will recess this case and continue it over and so...to 2 o'clock next Tuesday, July 22...

Id., at 50.

On July 22, 1980, the Court reconvened and the Commonwealth again presented its case against the petitioner. In addition to the policemen who executed the search warrant, the Commonwealth presented as witnesses the two codefendants of the accused.[5] Based on the evidence presented after the continuance, the Court found the petitioner guilty of the charges.

## II. GROUNDS FOR WRIT OF HABEAS CORPUS

Petitioner now challenges the validity of his conviction by focusing on the continuance granted by the Court which delayed the trial thereby allowing the Commonwealth to obtain the two co-defendants as witnesses. Petitioner contends that the granting of the

continuance violated his rights to due process, constituted double jeopardy in violation of the Fifth Amendment, and denied him his right to a speedy trial. For the reasons set forth below, the Court is of the opinion that the double jeopardy claim merits relief.

A. DOUBLE JEOPARDY

The Fifth Amendment provides, in pertinent part, that "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[6] Although originally construed to apply to only those prosecutions commenced after a first verdict had been rendered, the Double Jeopardy Clause later evolved to include subsequent prosecutions where the first did not culminate in a convication or an acquittal. See United States v. Perez, 22 U.S. (9 Wheat) 579 (1824). Currently, the prohibition against double jeopardy is seen to protect three

interests of the accused. First, it protects against a second prosecution for the same offense after acquittal. Secondly, it protects against a second offense after prosecution. Finally, it protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

The Double Jeopardy Clause applies only when jeopardy has "attached". When jeopardy attaches depends upon the type of trial involved. Where a jury trial is requested, jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). Where, as in petitioner's case, the trial is before judge, jeopardy attaches when the first witness is sworn. Serfass v. United States, 420 U.S. 377 (1975). In the case currently before the Court, it is clear from the record that jeopardy attached since the Commonwealth presented evidence through the testimony of a

sworn witness. Therefore, it remains for the Court to determine whether the continuance granted by the trial court upon the motion of the Commonwealth to obtain additional witnesses for the prosecution and over the objections of the defendant constitutes double jeopardy.

The Court first notes that there are relatively few cases reported where the prosecution commenced without necessary witnesses being present. Nearly identical factual situations and legal issues existed in those cases. In each case, the trial was by jury and not before a judge. During the course of the trial, the court discharged the jury before a verdict had been reached. The issue decided was whether the subsequent prosecution of the accused after the discharge of the jury violated the Double Jeopardy Clause and was therefore barred. Although the instant situation varies from those cases

in that the discharge of a jury clearly terminates the proceeding whereas a continuance granted by the trial court is not so clear, the Court believes that they provide proper guidance for the disposition of the petition now before the Court since a diligent search for case law whereby the granting of a continuance in a bench trial affects the Double Jeopardy Clause proved fruitless.

In Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), Annot., 74 A.L.R. 83 (1931), the court noted the following facts:

> ...When the case was called for trial [on May 3, 1928,] the district attorney proceeded to impanel the jury without having ascertained whether or not his witnesses were present. He was relying upon the testimony of two of the codefendants...who had previously pleaded guilty and who were released under bond to appear for sentence on the day of the trial. They were not subpoenaed as witnesses, but it was assumed by the district attorney that they would be present at the trial in view of their obligation and bond so to do. Immediately after the first jury was impanel-

> ed, the district attorney ascertained that his witnesses were absent, whereupon the court continued the case from time to time to May 8...

48 F.2d at 69.

On May 8, the district attorney announced that he was still unable to locate the witnesses whereupon the court discharged the jury. On May 6, 1930, two years after the first attempt to try the accused, the accused was tried and convicted.

Although the issue specifically before the Court consisted of whether the discharge of jury in the first proceeding barred the subsequent reprosecution of the accused, the Court's opinion stated principles that apply just as well to the granting of a continuance where witnesses for the prosecution are absent. The opinion notes that the district attorney, "upon his own suggestion, proceeded with the impanelment of the jury...without having ascertained whether or not his wit-

nesses were present. Nothing was done by the defendant at that time would prevent his raising the question of former jeopardy." 48 F.2d at 71. Thus, the district attorney's acts in not ensuring the presence of the witnesses and the accused's failure to contribute to the situation which might prevent the accused from raising a former jeopardy claim must be considered.

The Court also stated that "[T]here is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called all or some of his witnesses." Ibid. Rather

> the position of the district attorney was no different from what it would have been if he had produced all the evidence he had the ability to produce and had discovered that such evidence was insufficient to justify a conviction. His announcement in advance of the presentation of evidence that indispensable wit-

> nesses were absent was merely an admission that he could not convict the defendant with the evidence that he was able to produce.[7]

Id., at 73.

Thus, once jeopardy attaches, whether it be through the impanelment and swearing of the jury or, in the case of a trial before a judge, the sworn testimony of the first witness, the prosecutor may not stop the trial merely because of insufficient evidence or missing indispensable witnesses. Id., at 71.

The Supreme Court expressly approved Cornero in Downum v. United States, 372 U.S. 734 (1963), although it did not go as far as Cornero in holding that anytime a witness is absent and a continuance is sought, the Double Jeopardy Clause is invoked. When faced with facts strikingly similar to Cornero,[8] the Supreme Court refused to say that the absence of witnesses can never

justify the discontinuance of a trial; rather, it indicated that each case must turn on its facts. Id., at 737. In noting that the key witness for several counts against the petitioner was absent, the Court held that the discharge of the jury and subsequent re-trial of the petitioner constituted double jeopardy.[9] Accordingly, although the mere absence of witnesses may justify a continuance of the trial, where the absent witness is indispensable to prosecution's case and is absent by virtue of the prosecutor's unexcused negligence, a continuance may constitute double jeopardy.[10]

Although presenting a factual scenario different from petitioner's, the case of Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), provides other insight into the Double Jeopardy Clause:

> After jeopardy attaches, the defendant possesses a valued right to have his guilt or innocence determined before the first

> trier of fact (Citation omitted) ...Because the Double Jeopardy Clause makes no distinction between bench and jury trials, the fact that [the accused's] trials were before the same judge is immaterial to a determination whether his second trial violated the Fifth Amendment. (Citations omitted) After jeopardy attached at the ...trial, [the accused] possessed a valued right to have the judge decide his case that day, based upon the proof the Commonwealth could adduce.

607 F.2d at 1086.

Accordingly, even though the same judge may preside over a subsequent trial, if jeopardy has attached in the first trial, it is irrelevant that the same judge is trying the case as he is no longer the "first trier of fact".

In summary, those cases in which the prosecution's witnesses are absent utilize the following principles. First, after jeopardy attaches, the accused possesses a valued right to have his guilt or innocence determined before the first trier of fact. Secondly, once jeopardy has attached, the pro-

secutor may not stop the trial merely because of his discovery of insufficient evidence or absent indispensable witnesses. Finally, although the mere absence of a witness may justify the continuance of a trial, where the witness is indispensable to prosecution's case against the accused and is absent by virtue of the unexcused negligence of the prosecutor, a continuance may constitute double jeopardy.

In applying these principles to the facts in the instant case, it is evident to the Court that the granting of the continuance subjected petitioner to double jeopardy in violation of the Fifth Amendment. As indicated previously, jeopardy attached upon the sworn testimony of the first witness in the proceeding. Upon the completion of his testimony, it was evident that the Commonwealth needed to bolster its case with the testimony of the co-defendants to impli-

cate petitioner. Although one such witness was present, the Commonwealth did not call him but rather sought a continuance so that the co-defendant could purportedly obtain the advice of his counsel to determine whether he should testify.[11] Although counsel had been known to the Commonwealth well in advance of the trial date, no effort until shortly before the trial was made to procure the testimony of this witness. The Commonwealth did not even compel the witnesses to be present by subpoenaing them.

When the trial reconvened, petitioner was confronted with not just the testimony of one of his co-defendants but both of them. Neither of them were available to testify on the date the continuance was granted. The petitioner's valued right to have his guilt or innocence determined before the first trier of fact was thereby violated, regardless of the fact that it was the same judge

who presided over the trial just a few days earlier. Furthermore, the right of the petitioner to have the judge decide his case the day the trial began based upon the proof adduced by the Commonwealth was violated in that the continuance provided the Commonwealth the opportunity to review the weaknesses in its case and obtain even more evidence against petitioner to secure a conviction.[12]

Had the Commonwealth proceeded with a trial tactic other than a continuance to obtain the co-defendants' testimony, a different result might have been reached. However, because the purpose of the Commonwealth in requesting the continuance was to obtain absent witnesses who were ultimately indispensable to its case against petitioner after the Commonwealth indicated it was ready to proceed with trial and the Commonwealth in fact procured their testimony, this Court

concludes that petitioner was placed in double jeopardy in violation of his constitutional rights. Accordingly, the petition for a writ of habeas corpus shall be granted in an order to be entered this day.

A certified copy of this Memorandum Opinion shall be sent to counsel for petitioner and for respondents.

ENTER: This 7th day of December, 1982.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1]Although not the owner of the dwelling, petitioner resided there when he was in Roanoke. Nancy Thompson, a co-defendant, owned the premises.

[2]Subsequent laboratory analysis proved the substance to be Metamphetamine, a Schedule II controlled substance.

[3]Although not indicted until May of 1980, the three retained counsel shortly after their arrest. Documents submitted by counsel for petitioner at the habeas proceeding show that the Commonwealth's Attorney was aware of those counsel retained to represent the three well in advance of trial. See Hearing of September 24, 1982 (hereinafter "Hearing"), Exhibits 1, 2, and 3.

[4]The habeas hearing produced the following undisputed facts with regard to the effort to obtain the testimony of the codefendants: Neither of the co-defendants had been subpeonaed to testify at the trial held that day, Hearing, at 22 and 46, that one of the co-defendants, Virgil Spence, was present in the courthouse during the trial of petitioner, with the knowledge of the Commonwealth's Attorney, id., at 55, and that despite his presence, the co-defendant was not called to the stand to determine whether he would answer questions or not, Id., at 52. Counsel representing Spence at the time of the trial indicated in the habeas proceeding that he instructed his client to "tell the truth and co-operate to the best of his ability" should he be subpoenaed. Hearing, at 12-13. However, as the co-defendant was never subpoenaed or called to testify even though present in the courthouse, there was

no indication of the testimony that would have been elicited.

[5]Of primary importance to the Court is that the original purpose of the continuance was to obtain the testimony of Spence alone. However, when the trial reconvened, both codefendants, although originally not subpoenaed nor part of the plan to prosecute the accused, testified against petitioner. The transcripts of the trial reflect the importance of the testimony, especially that of Thompson, in securing the conviction of petitioner.

[6]The basis for the prohibition against double jeopardy is articulated in Green v. United States, 355 U.S. 184 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-188.

[7]The Court also emphasized that

> We are dealing, however, with a fundamental right of a person

> accused of a crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice..."No] court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of the jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case.
>
> Id., at 71.

Coenero has since been cited for the proposition that the guaranty against double jeopardy "protects an accused against a second trial where the jury in the first trial was discharged solely on the ground that witnesses for the government were absent and therefore their testimony could not be adduced." Hunter v. Wade, 169 F.2d 974 (10th Cir. 1948).

[8]In Downum, the facts were as follows:

> On the morning of April 25, 1961, the case was called for trial and both sides announced ready. A jury was selected and sworn and instructed to return at 2 p.m. When it returned, the prosecution asked that the jury be discharged because its key

> witness on Counts 6 and 7 was not present - one Rutledge, who was the payee on the checks involved in those counts. Petitioner moved that Counts 6 and 7 be dismissed for want of prosecution and asked that the trial continue on the rest of the counts. This motion was denied and the judge discharged the jury over petitioner's objection. Two days later when the case was called again and a jury impaneled, petitioner pleaded former jeopardy. His plea was overruled, a trial was had, and he was found guilty.
>
> 372 U.S. at 373.

[9]The holding in Downum has since been summarized as follows: "In Downum, it was the unexcused negligence of the Government attorney in announcing his readiness for trial, when, in fact, he had not subpoenaed a necessary witness that was the basis of the Court's holding of double jeopardy." United States v. Levy, 232 F. Supp. 661, 663 (N.D. Fla. 1964).

[10]This principle is reinforced by United States v. Gunter, 631 F.2d 583 (8th Cir. 1980) where a continuance was granted on the motion of the prosecution to enable the prosecution to develop circumstantial evidence. The Court held that in view of the neutral evidence submitted and the brief delay resulting from the continuance (from 3:30 p.m. of the first day of trial to 11:40 a.m. the next day), there was no abuse of discretion.

[11]This court concludes that the Commonwealth Attorney requested the con-

tinuance soley because of his realization that the case could not be made against the petitioner without the testimony of at least one of the co-defendants. The trial court also believed that the testimony of a co-defendant would shed light on the case; accordingly, the motion for the continuance was granted. However, it is apparent from the record that the primary reason for the absence of the indispensable witnesses was the Commonwealth's failure to procure their testimony through subpeona.

Respondent cites Mizell v. Attorney General of New York, 586 F.2d 942 (2nd Cir. 1978), cert. denied, 440 U.S. 967 (1979), for the proposition that a continuance was proper. 586 F.2d at 947. However, that case is distinguishable from the present situation as it never stressed the importance of the witnesses who were absent. This court concedes that the mere absence of witnesses may justify a continuance; however, it emphasizes that where the continuance is used so that absent indispensable witnesses can be made available, it may place the accused in double jeopardy.

[12]The transcript of the trial makes abundantly clear that the co-defendants' testimony was the linchpin in securing petitioner's conviction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

| | | |
|---|---|---|
| DAVID MONTGOMERY WEBB<br>Petitioner | ) | Civil Action No. 81-369-R |
| v. | ) | O R D E R |
| TERRELL DON HUTTO<br>Respondent | ) | By: Hon. James C. Turk<br>Chief U.S. District Judge |

Inasmuch as it appears that the Court erred in its Memorandum Opinion filed in this case on December 8, 1982, it is ORDERED that the first paragraph of said opinion shall be, and hereby is, amended to reflect that petitioner's conviction was entered in the Circuit Court for the City of Salem rather than the Circuit Court for the City of Roanoke as previously stated.

The Clerk is directed to send a certified copy of this Order to counsel of record for the parties.

ENTER: This 10th day of December, 1982.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

DAVID MONTGOMERY WEBB, Petitioner ) Civil Action No. 81-369-R
)
v. ) O R D E R
)
TERRELL DON HUTTO, Respondent ) By: Hon. James C. Turk
Chief U.S. District Judge

As it appears that the Judgement Order filed December 8, 1982, erroneously describes the alternatives available to the Commonwealth of Virginia, it is hereby ORDERED that said Judgment Order be amended so as to delete paragraph (2) and insert the following in its place.

(2) that petitioner, David Montgomery Webb, be released from the custody of the respondent for that conviction imposed by the Circuit Court for the City of Salem, Virginia, on July 24, 1980, namely

(a) Criminal Case No. 1614 - twelve years for possession with intent to distribute a controlled substance;

The clerk is directed to send a certified copy of this Order to counsel for petitioner and for respondent.

ENTER: This 10th day of December, 1982.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

DAVID MONTGOMERY WEBB, Petitioner ) Civil Action No. 81-0369-R
)
v. ) O R D E R
)
TERRELL DON HUTTO, Respondent ) By: Hon. James C. Turk
Chief U.S. District Judge

On motion of respondent to Amend Judgment and/or to Enter a New Judgment in respondent's favor, it is hereby ORDERED that said motion be, and thereby is, denied. The Court is of the opinion that Wainwright v. Sykes, 433 U.S. 72 (1977), been substantially complied with and that exhaustion is no bar to the relief granted.

It is further directed that on motion of respondent, the Order and Memorandum Opinion filed in this action on December 8, 1982, as amended December 10, 1982, be stayed during the pendency of an appeal to the United States Court of Appeals for the Fourth

Circuit. It is so ORDERED.

A certified copy of this Order shall be sent to counsel for petitioner and for respondent.

ENTER: This 4th day of January, 1983.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

DAVID MONTGOMERY WEBB, Petitioner ) Civil Action No. 81-0369-R
)
v. ) O R D E R
)
TERRELL DON HUTTO, Respondent ) By: Hon. James C. Turk
Chief U.S. District Judge

On motion of petitioner to Re-open and Expand Record, it is hereby ORDERED that said motion be, and hereby is, granted, the Court being of the opinion that it is in the interest of justice to so do.

It is further directed that on said motion of petitioner, the affidavit and exhibit tendered with said motion be filed and made part of the record in this cause and the Court does hereby find that the petitioner did argue double jeopardy before the three-judge panel of the Virginia Supreme Court on July 21, 1981, and therefor, the prior jeopardy argument was thereby fairly raised

before the Virginia Supreme Court. It is so ORDERED. It is further ORDERED that this Court's Order and Memorandum Opinion of December 8, 1982 is amended to include the finding of this Order.

A certified copy of this Order shall be sent to counsel for petitioner and for respondent.

ENTER: This 2nd day of February, 1983.

s/ James C. Turk
CHIEF UNITED STATES DISTRICT JUDGE

"ATTACHMENT F"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 29th day of July, 1981.

David Montgomery Webb, Appellant,

against Record No. 810049
Circuit Court Nos. 1613 and 1614

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Salem

Finding no reversible error in the judgments complained of, the court refuses the petition and supplemental petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant

the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: s/ Richard R. Birch
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

| | | |
|---|---|---|
| Attorney's fee | $400.00 | plus his costs and expenses |
| Filing fee | 25.00 | |

Teste:

Allen L. Lucy, Clerk

By: s/ Richard R. Birch
Deputy Clerk

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in

rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court

thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend

upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in

the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State

court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise

denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or

is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court

shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

**********

DAVID MONTGOMERY WEBB,
PETITIONER

versus

CIVIL ACTION
#81-369

TERRELL DON HUTTO,
RESPONDENT

**********

BEFORE: THE HONORABLE JAMES C. TURK

CHIEF DISTRICT JUDGE

ROANOKE, VIRGINIA

SEPTEMBER 24, 1982

[P. 10] [DIRECT EXAMINATION
BY MR. BOSEN]

Q. Now, Mr. Phillips, going back and figuring the time frame in all of this then, you actually had become involved in late November and went with Mr. Spence as his counsel of record all the way through until he was actually sentenced on October the 20th?

A. Yes.

Q. So approximately eleven (11) months?

A. Yes.

[P. 11]

Q. And would you just tell the Court during those eleven (11) months after Mr. King knew you were his attorney, how many times Mr. King approached you prior to July 17th, if you can recall, prior to Mr. Webb's trial, about having Mr. Spence testify on behalf of the Commonwealth?

A. You mean him coming to me and approaching me?

Q. Either coming to you physically or orally over the phone or in any way?

THE COURT: Contacting you in any way?

MR. PHILLIPS: Yeah, in any way. I don't think he ever was the aggressive or the aggressor in that. I think I contacted him one time in an attempt maybe to make a plea bargain. My client was very nervous.

DIRECT EXAMINATION CONTINUED

BY MR. BOSEN:

Q. Did he indicate --- did Mr. King indicate to you that he was interested in plea bargaining with your client in exchange for his testimony or for any other reason?

A. No, sir.

Q. Now, apparently on July the 17th when Mr. Webb's trial began you were on vacation?

A. Yes.

Q. Had Mr. King contacted you just prior to the 17th to see if your client was going to be at trial, at Mr. Webb's trial, on the 17th?

[P. 12]

A. No --- I don't think so. I don't have any notes of that and if he did it was very casual. I mean, he may have said something like, is your client going to cooperate or something like that, but I can't really recall that.

[P. 22]

DIRECT EXAMINATION CONTINUED

BY MR. BOSEN:

Q. Now, do you recall checking the file in the clerk's office of the Circuit Court, the City of Salem, right up until the time that the issue was joined and the witnesses sworn on that date to see if there were any subpoenaes in that file?

[Mr. Hoback] A. I certainly did. I make it

a practice to always check the court file to see what witnesses have been subpoenaed before a trial comes up that I'm involved in. And right up until the day of the trial I made certain that neither of the co-defendants had been subpoenaed. That would have changed my [P. 23] whole defense if they had been subpoenaed.

[P. 30]

DIRECT EXAIMINATION CONTINUED

BY MR. BOSEN:

Q. Let me ask you, Mr. Hoback, to your knowledge had Mr. King prior to the 17th attempted to get either one of these two (2) co-defendants to testify on the 17th against your client?

A. Well, you know, especially a drug case and a serious offense type case I always try to find out prior to the trial whether or not the Commonwealth will have a co-defendant testifying against my client or whether my

client should plead guilty or not guilty or what would be his best or her best interest. And I was absolutely certain that the Commonwealth had not planned on calling either one of the co-defendants.

Q. Had you communicated with those co-defendants' attorneys to verify this?

A. I had told my client, Mr. Webb, to talk to Nancy Thompson and Virgil Spence if he could to see if they had been called to testify at his trial and he reported back to me that ---

Q. Called without subpoena?

A. Well, yes, called or subpoenaed. He reported back to me that they had not heard anything and were not planning on being there for the trial. I even went that far to check.

[P. 44]

THE COURT: Let me ask you one question. When did you decide to ask for a con-

tinuance? Did you know before the case started that you were going to ask for a continuance or did it come up after the case once started?

MR. KING: After the case had already started, Your Honor. We were in trial and when Spence --- when I decided to put Spence on the stand at that time, I realized that Spence [P. 45] perhaps wanted to talk to his attorney. Probably if I made a mistake the thing would have been to have talked to Spence before the defendant pled. But it was only after we got into trial that I realized that Spence would have felt comfortable in talking with his attorney who was not in town that day that I requested that the Court --- the recess or continuance as it were.

DIRECT EXAMINATION CONTINUED

BY MR. BOSEN:

Q. Fred, you knew back on November 21 that Charlie Phillips was his attorney,

didn't you?

A. Yes.

Q. You wrote him a letter, I believe, confirming it.

A. Whatever the date. I had known that Charlie was going to be Mr. Spence's attorney for quite some time, yes.

THE COURT: Well, was it after this trial started that you decided that you would use Mr. Spence?

MR. KING: No, sir. It was after the trial started that I realized that Mr. Spence would not testify without Mr. Phillips being there. Mr. Phillips, I guess, would be safely characterised him [sic] as somewhat of a workaholic. It is highly unusual that Mr. Phillips is never in his office either Saturdays or Sundays or whatever. I just did not realize that he was out of town until the day before.

THE COURT: You knew it the day

before?

[P. 46]

MR. KING: I talked to Mr. Doherty the day before, yes sir.

THE COURT: Well, when you got in there and the Commonwealth announced ready for trial and started, did you know at that time that you were going to put on part of the evidence and then ask for a continuance?

MR KING: No sir, I didn't realize at that time that Mr. Spence would not testify without talking to Mr. Phillips first. At that time I thought that perhaps Spence might, in fact, testify or if he did not that we might proceed without his testimony.

DIRECT EXAMINATION CONTINUED

BY MR. BOSEN:

Q. Had you subpoenaed him?

A. No.

Q. Had you talked with Mr. Phillips about the fact that Mr. Phillips' trial was

set for the 23rd and Mr. Webb's trial was set for the 17th and you would want Mr. Phillips' client there on the 17th?

A. I had talked with Mr. Phillips about whether or not his client would testify previous to the date.

Q. What did you tell him?

A. Nothing point blank to the sense that his client would testify or would not testify, merely comments to the effect that his client would probably testify and it would be in his [P. 47] best interest to co-operate.

Q. And you had not tried to make any plea bargain or anything to that effect?

A. None whatsoever, sir.

Q. How about the attorneys for Nancy Thompson? Had you talked to them about whether or not she'd appear on the 17th? She wasn't subpoenaed either.

A. I don't believe I had.

[P. 51]

CROSS EXAMINATION CONTINUED

BY MR. SMITH:

Q. And if Judge Kuntz had denied your recess would you have gone forward with those three (3) witnesses?

[MR. KING] A. I most certainly would.

Q. In addition to the witness you'd already put on?

A. Yes, sir.

Q. So this was not just --- you were ready to go forward with all your evidence other than Spence. You just put on the one evidence and I believe the record indicates that at that time you called Mr. Doherty.

A. Yes.

MR. BOSEN: Mr. Doherty wasn't called, Your Honor. Oh, you mean called as a witness or called on the telephone?

MR. SMITH: No, called on the telephone.

THE COURT: Called and had Mr. Doherty come in.

CROSS EXAMINATION CONTINUED

BY MR. SMITH:

Q. And was it at the point when Mr. Doherty came in and indicated that he didn't feel he could advise Mr. Spence, that point was when you realized or found out that, in fact, Mr. Spence probably wouldn't testify or couldn't testify?

A. That's correct.

[P. 52]

Q. But you felt that he ought to have the opportunity to talk to Mr. Phillips?

A. That's right.

Q. When Mr. Doherty, not the day beore, but when you contacted him on the telephone up until that point did you still feel that Spence was going to testify?

A. I still felt that there was a strong possibility that Spence would testify.